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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re JOSLYN R. et al., Persons Coming Under
the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

S.A.,

Defendant and Appellant.

F072493

(Super. Ct. Nos. JD134400,
JD126197)

OPINION

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega,
Judge.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant
and Appellant.

Theresa A. Goldner, County Counsel, and Elizabeth M. Giesick, Deputy County
Counsel, for Plaintiff and Respondent.

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S.A. (mother) appeals from the juvenile court's orders denying her petition for modification under Welfare and Institutions Code section 388¹ and terminating her parental rights over her two children, Joslyn and Jordyn, under section 366.26. She contends the juvenile court abused its discretion in denying the section 388 petition because she demonstrated that her request for custody or reinstatement of family maintenance services was supported by changed circumstances and the best interests of the children. Mother also argues the juvenile court erred when it found the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) did not apply and terminated her parental rights. For the reasons articulated below, we reject mother's arguments and affirm.

STATEMENT OF THE FACTS AND CASE

Section 300 Petition and Mother's First Section 388 Petition

In March of 2011, the Kern County Department of Human Services (department) filed a section 300 petition on behalf of newborn Joslyn, alleging mother's long history of drug abuse and previous history with Child Protective Services placed Joslyn at risk of harm. At the time, mother was in a residential rehabilitation facility. Joslyn was mother's fifth child; mother previously lost custody of three older children in 2008 and 2009 and another child was in the primary custody of his father.

Mother was in a long-term relationship with Joslyn's father, John R. (father). He had a significant criminal history, including multiple arrests for domestic battery, and lost parental rights to his other children. In 2010, father was incarcerated on battery charges for kicking mother, who was then five months pregnant with Joslyn. His release date was set for July of 2011.

In March of 2011, mother reported that she last used drugs in November of 2010, and she denied she was still involved with father. Because mother was making good

¹ All further statutory references are to the Welfare and Institutions Code.

progress in her program, the social worker recommended Joslyn remain with mother with family maintenance services in place. On May 12, 2011, the juvenile court sustained the petition, finding Joslyn a dependent and ordered home placement with family maintenance services.

On August 15, 2011, mother filed a section 388 petition seeking termination of jurisdiction based on completion of her residential drug program in June of 2011, a domestic violence and sexual assault program in July of 2011, and compliance with drug testing. On September 14, 2011, the juvenile court granted mother's petition, terminated jurisdiction and granted mother sole physical custody of Joslyn.

New Section 300 Petition

In April of 2013, the department filed a section 300 petition on behalf of Joslyn after a referral of general neglect and failure to protect her from domestic violence. Mother was said to be living in a motel which had high prostitution traffic and drug use. Investigation into the referral found mother's place of residence filthy. Mother had a laceration on her face, which she claimed she received in a dispute with a family member. Mother admitted ongoing drug use, including methamphetamine the previous day. Mother stated she was willing to enroll in a substance abuse program and requested Joslyn remain in her care. She denied she and father were presently together and stated they were no longer violent towards each other, but fought verbally. Father's criminal history revealed he had recently violated postrelease supervision and an order to prevent domestic violence.

The juvenile court assumed jurisdiction over Joslyn and she was detained in foster care. At this point, mother was pregnant with her sixth child, also father's, and had to leave the motel due to problems with father. Mother reactivated substance abuse counseling in April of 2013, but declined drug tests early that month.

At disposition, the juvenile court declared Joslyn a dependent of the court and removed her from mother's custody. Mother was granted reunification services and twice a week supervised visitation.

Six-Month Review

In anticipation of the six-month review hearing in October 2013, the social worker reported mother was residing in a recovery home for expectant mothers, where she could remain for two months after the birth of her child. Mother continued to have ongoing contact with father, which was of concern due to their domestic violence history. Mother completed parent neglect training in July 2013; was active in domestic violence classes expected to be completed in October of 2013; was active in a substance abuse recovery program; and her drug tests were consistently negative.

Mother visited Joslyn regularly and their interaction was affectionate and appropriate. The length of the visits was increased in July of 2013, and unsupervised visits were planned to begin shortly.

At the six-month review hearing October 29, 2013, the juvenile court ordered Joslyn remain out of mother's care and that reunification services and visitation continue.

Mother's Second Section 388 Petition

On February 13, 2014, mother filed a section 388 petition requesting return of Joslyn to her care. The petition alleged mother completed an inpatient substance abuse program, a 50-hour domestic violence program, drug tested negative since April 2013, and that she had given birth to Jordyn in November of 2013, who remained in her care. Joslyn had begun overnight visits with mother in February 2014, and mother was preparing to move into an apartment of her own.

On March 17, 2014, the juvenile court granted the section 388 petition and ordered Joslyn returned to mother's custody and that family maintenance services be provided.

September 2014 Review

In anticipation of the September 2014 family maintenance review hearing, the social worker reported father was incarcerated; Joslyn and Jordyn remained in mother's care; and mother regularly attended NA meetings and was compliant with her interim services. However, mother failed to drug test on June 30, July 25, and August 11, 2014, which were counted as presumptively positive, and she tested positive for amphetamines and methamphetamines on July 17 and 28, 2014. Mother was referred to substance abuse counseling, which was to begin August 27, 2014. Mother was said to be committed to her sobriety and did not want to lose her children.

At the review hearing September 17, 2014, the juvenile court ordered continuation of family maintenance services, with mother to enroll in substance abuse counseling and random drug testing.

March 2015 Review

The social study prepared for the March 2015 family maintenance review hearing stated father had been released from prison and had come by mother's home to visit the children in both October and November 2014. Each time, mother had to be reminded that she was not to allow such unauthorized visits.

In January 2015, the social worker made an unannounced home call and found an unidentified male, who mother identified as her boyfriend, in mother's bedroom. In mid-January 2015, father was arrested for public intoxication inside the apartment complex. At the end of January 2015, father was arrested and incarcerated for violation of postrelease supervision.

Mother was suspected of prostituting from her home and she continued to abuse crack cocaine. She tested positive for amphetamines and methamphetamines on January 16, 2015; her February 26, 2015, drug test was presumptively positive; and in March 2015, mother's substance abuse counselor assessed her level of program participation as minimal.

At the review hearing March 17, 2015, the juvenile court continued family maintenance services.

Section 300 and 387 Petitions

The following day, on March 18, 2015, the department filed a section 300 petition on behalf of Jordyn and a supplemental section 387 petition on behalf of Joslyn. Both children were detained. Police had been called during a domestic violence incident on March 15, 2015, in which mother was hit several times in the face and ear, causing her ear lobe to detach. The children were present at the time. Mother declined an emergency protective order offered by police and stated she would obtain a restraining order on her own time.

On March 20, 2015, the social worker met with mother, who acknowledged father “was never going to change” and she was going to pick up a restraining order that day. Three days later, mother provided a copy of the filed temporary restraining order, as well as forms showing she had been approved for a two-bedroom house.

The department recommended mother not receive reunification services, pursuant to section 361.5, subdivision (b)(10) and (11)². The social worker opined mother was unlikely to sever her relationship with father, and that her children’s need for safety outweighed the emotional detriment caused by removal.

At jurisdiction May 7, 2015, the juvenile court sustained the section 300 petition as to Jordyn and the section 387 petition as to Joslyn.

² Section 361.5, subdivision (b)(10) provides reunification services need not be provided if the juvenile court previously ordered termination of reunification services for any sibling or half sibling of the child at issue because the parent failed to reunify with that sibling or half sibling and the parent has made no effort to treat the problem that led to removal of the sibling or half sibling; section 361.5, subdivision (b)(11) provides reunification services need not be provided if the parental rights of a parent over any sibling or half sibling of the child at issue were permanently severed.

At disposition June 10, 2015, Jordyn was declared a dependent and Joslyn continued as a dependent. Both were removed from mother's custody. The juvenile court found mother made minimal progress toward alleviating or mitigating the risk of harm to her children. Reunification services were not provided mother or father pursuant to section 361.5, subdivision (b)(10) and (11). Mother was provided weekly supervised visits with the children. A section 366.26 permanency planning hearing was set for October 1, 2015.

On June 15, 2015, mother filed a notice of intent to file a writ petition from the orders.

Third Section 388 Petition; Section 366.26 Hearing

On August 27, 2015, mother filed a section 388 petition requesting the orders for her children be modified to allow return of custody to her care with family maintenance services. Mother's petition alleged she made substantial progress in addressing the risk to her children and returning the children to her care would increase their sense of security and stability. Mother provided documentation that she completed a 13-week family strengthening and resilience program June 24, 2015; an outpatient substance abuse program August 13, 2015; and 15 of a 25-week domestic violence/sexual assault program, which began May 1, 2015. Her progress in the domestic violence/sexual assault program was reported on August 7, 2015, to be excellent.

The report prepared in anticipation of the section 366.26 hearing reported Joslyn and Jordyn were in a committed prospective adoptive home and, in September 2015, the adoption assessment was complete. The children were healthy with no emotional or health concerns reported. The adoption social worker opined that it would not cause major emotional detriment to either Joslyn or Jordyn to terminate mother's parental rights.

The report stated mother visited the children regularly and the visits were described as positive, although the children did not look to mother to meet their daily

physical and emotional needs. The social worker opined that, while adoption was recommended, the children would benefit from continued contact with each other after adoption due to shared common experiences and development of their sibling bond into adulthood. Joslyn was reported to share that she liked her current placement and would like to stay; she called her caretakers mom and dad.

On October 1, 2015, the juvenile court held a contested section 388/366.26 hearing. Mother testified she completed a parenting program in June 2015; a substance abuse program was completed August 13, 2015; random drug tests were negative; her last drug use was in April 2015; and she had a sponsor. Mother had two classes left to complete her 25-week domestic violence program. Mother acknowledged she had twice before completed both substance abuse and domestic violence programs, including a nine-month inpatient program with Jordyn. According to mother, the longest period in which she had refrained from drug use was for two years in or around 2006. She had also previously had a sponsor, but had not kept in contact on a daily basis as she did now.

Mother testified that, since 2006, any domestic violence incidents had been limited to father. The restraining order she filed in March 2015 would remain in effect for three years. Mother acknowledged this was the first time she had filed a restraining order against father. Mother felt she had learned from her mistakes as evidenced by the fact that she had voluntarily engaged in services without a court order. She claimed she recognized the domestic violence had been getting worse and understood the severity of the situation with father.

Mother testified she visited the children as often as allowed. She described her children as very attached to her, she loved her children, and she cherished the moments she had with them. Joslyn told mother she loved her and hugged her during visits; Jordyn at times cried at the end of their visits.

The juvenile court denied mother's section 388 petition, finding that, while mother had a solid visiting relationship with the children (mother attended 22 of 24 visits), she

failed to prove her circumstances had changed or that it was in their best interest to grant the petition. The juvenile court cited mother's lengthy substance and domestic abuse issues and her repeated inability to resolve those issues in the past.

The juvenile court proceeded to terminate mother's parental rights, finding clear and convincing evidence that the children were adoptable, and that while mother maintained regular visits and contact with the children, the permanency provided by adoption outweighed the benefit of continuing that relationship.

DISCUSSION

I. SECTION 388 PETITION

Mother contends the juvenile court abused its discretion in denying her section 388 petition. We find no error.

A petition to modify a juvenile court order under section 388 must allege facts showing that new evidence or changed circumstances exist, and that changing the order will serve the child's best interests. (§ 388, subd. (a).) The petitioner has the burden of proof by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(D).) In assessing the petition, the juvenile court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1529.)

The best interest of the child is of paramount consideration when, as here, a section 388 petition is brought after termination of reunification services. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A petition which alleges merely changing circumstances and would

mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

The "escape mechanism" provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*In re Casey D., supra*, 70 Cal.App.4th at p. 47.)

Here, the juvenile court found that, although mother's circumstances were changing, they had not yet changed. At the time of the contested hearing, mother had, as the juvenile court observed, made commendable efforts toward recovery by completing a treatment program, by continuing to attend domestic violence/substance abuse sessions, and by drug testing negative. But these efforts were relatively recent in contrast to her over 10-year history of drug abuse and lengthy abusive relationship with father. This inability on mother's part to adequately address her substance abuse and domestic violence issues caused her to unsuccessfully reunify with her four oldest children, and was the reason this was Joslyn's second dependency case. While mother tested negative for drugs the previous five months, she acknowledged that her previous attempts at abstinence lasted two years, "around 2006." Although mother contends she was committed to staying drug free, the record reflects significantly that mother relapsed several times after having already received treatment. And, although mother had a restraining order out against father, at this point he was incarcerated and there was no guarantee she would be able to stay away from him after his release, as she had allowed him back into her home on numerous occasions in the past. On the record before it, the

juvenile court's finding of "changing" as opposed to "changed" circumstances, in light of mother's relatively brief recovery, was well within the juvenile court's discretion.

Even assuming the juvenile court erred in failing to find mother changed her circumstances, the juvenile court properly denied the section 388 petition because mother did not meet her burden of showing that granting the petition was in the children's best interests. Her section 388 petition alleged simply that returning the children to her care "would create a greater sense of security and stability" for Joslyn and Jordyn. The department's report established that Joslyn and Jordyn were together in a stable placement with caretakers who were committed to adoption. The social worker reported that Joslyn, who was now almost five years old, liked her current home, called her caretakers mom and dad, liked the food they cooked, and wished to stay there as her mom and dad always played with her. Jordyn, who was not yet two years old, was not able to voice an opinion. Although the adoption social worker acknowledged mother's relationship with Joslyn and Jordyn was positive in nature, neither looked to her to meet their daily needs. The adoption social worker opined that it would not be detrimental to Joslyn and Jordyn if mother's parental rights were terminated. Mother's testimony that the children were attached to her and had a good relationship with her was not sufficient to prove that placing the children with her was in the best interests of the children who, by all accounts, had found a stable and loving home with prospective adoptive parents committed to their care and well-being.

We conclude, based on the foregoing, the juvenile court properly exercised its discretion in denying mother's section 388 petition.

II. PARENTAL BENEFIT EXCEPTION TO TERMINATION OF PARENTAL RIGHTS

Mother also contends the juvenile court erred because there was sufficient evidence that the section 366.26, subdivision (c)(1)(B)(i) exception based on the

beneficial parent-child relationship precluded termination of her parental rights over Joslyn and Jordyn. We disagree.

At a hearing under section 366.26, the juvenile court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re K.P.* (2012) 203 Cal.App.4th 614, 620.) To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, that the child is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that a relative guardianship should be considered (§ 366.26, subd. (c)(1)(A)) or that termination of parental rights would be detrimental to the child under one of six statutory-specified exceptions (§ 366.26, subd. (c)(1)(B)(i)-(vi)), the juvenile court “shall terminate parental rights.” (§ 366.26, subd. (c)(1).)

Section 366.26, subdivision (c)(1)(B)(i) provides that the juvenile court may decline to terminate parental rights if it “finds a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” A beneficial parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(B)(i) is one that “‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citations.]” (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621.) To establish the exception, “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life. [Citation.]” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) Furthermore, “[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an

extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' [Citation.]" (*In re K.P.*, *supra*, p. 621.)

The parent has the burden of proving the statutory exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The juvenile court's decision that a parent has not satisfied this burden may be based on either or both of two component determinations – whether a beneficial parental relationship exists and whether the existence of that relationship constitutes “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B); see *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. (*In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1527-1528.) When the juvenile court concludes the benefit of the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.*, *supra*, at pp. 621-622; *In re Bailey J.*, *supra*, at pp. 1314-1315.)

Here, the juvenile court, in addressing mother's claim that the parent-child exception applied, acknowledged that mother maintained regular visitation and contact with the children, but “[w]hen viewing the benefit of continuing the relationship versus the permanency of adoption in this situation, again, I feel that it's unfortunate, but the court does conclude that the permanency provided by adoption does outweigh the benefit of continuing the relationship, therefore, the court finds that the exception does not apply.” The juvenile court's conclusion was proper.

Mother did not establish that it would be in the best interests of the children to remove them from their caregiver's home. Mother failed to demonstrate that she played a parental role in the children's lives even though she was loving and caring during her visits with them. Because a child will derive some incidental benefit from interaction

with a natural parent, “[c]ourts have required more than just ‘frequent and loving contact’ to establish the requisite benefit” for the section 366.26, subdivision (c)(1)(B)(i) exception to apply. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; see also *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [“Interaction between natural parent and child will always confer some incidental benefit to the child.... The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.”].) Although a beneficial parent-child relationship can exist even without day-to-day contact, the parent must occupy a parental role in the child’s life. (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.) To be simply a “‘friendly visitor’” is not sufficient. (*Id.* at p. 52.) The evidence did not show mother had the kind of parental relationship that section 366.26, subdivision (c)(1)(B)(i) was designed to preserve.

In addition, as discussed elsewhere here, the evidence before the juvenile court showed the children were happy and content in the home of their caregivers, the caregivers met their needs and the children were bonded to them. This was in contrast to the tenuous placement mother offered. As observed in *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350, “a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.” Considering the totality of the record, mother failed to establish that the parental relationship “promote[d] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

The juvenile court accordingly did not err in finding the section 366.26, subdivision (c)(1)(B)(i) exception did not apply, and did not err in terminating mother’s parental rights.

DISPOSITION

The orders of the juvenile court are affirmed.

FRANSON, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

PEÑA, J.